

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13**

**IMPACT SITE WORKS, LLC<sup>1</sup>**

**Employer**

**and**

**Case 13-RC-271615**

**INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 150, AFL-CIO**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended (“Act”), a video hearing on this petition was conducted before a hearing officer of the National Labor Relations Board (“Board”). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated to the undersigned its authority in this proceeding to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.<sup>2</sup>

**I. ISSUES AND PARTIES’ POSITIONS**

Petitioner seeks to represent a unit of the Employer’s employees comprised of six equipment operators employed at its East Chicago, Indiana, job site. The Employer seeks a wall-to-wall unit including five additional employees. Four of the additional employees are junior operators<sup>3</sup> whom the Employer contends share a community of interest with the petitioned-for

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<sup>1</sup> The Employer’s name appears as amended by stipulation of the parties.

<sup>2</sup> Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer’s rulings made at the hearing are free from prejudicial error and are affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. Petitioner is a labor organization within the meaning of the Act.
- d. Petitioner seeks to represent certain employees of the Employer in the unit described in the instant petition, but the Employer declines to recognize Petitioner as the collective-bargaining representative of those employees.
- e. There is no collective-bargaining agreement covering any of the employees in the voting group sought in this petition and the parties do not contend there is any contract bar to this proceeding.
- f. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

<sup>3</sup> There are different contentions between the parties as to the actual classification of the disputed employees classified by the Employer as junior operators. Petitioner would classify them as laborers and although the Employer acknowledges it has referred to them as laborers, for the sake of this decision, the disputed employees will be consistently referenced as junior operators.

employees. The other additional employee is a scale operator that the Employer contends should also be included in the unit as a residual employee.

## II. DECISION

As explained below, based on the record and relevant Board law, I find that the petitioned-for unit is an appropriate unit. Accordingly, I direct an election in the following appropriate bargaining unit:

**Included:** All full-time and regular part-time equipment operators employed by the Employer currently working at its jobsite located at 5135 Kennedy Avenue, Site Trailer A, East Chicago, Indiana.

**Excluded:** All junior operators, scale operators, salaried managers, temporary employees, other contracted employees, office clerical employees, confidential employees, professional employees, guards, and supervisors as defined by the Act.

## III. STATEMENT OF FACTS

The Employer provides environmental consulting and remediation services throughout the U.S. Currently, the Employer is engaged in a long-term project<sup>4</sup> located at a 240-acre jobsite in East Chicago, Indiana, where it is remediating, or converting, contaminated ground deemed unusable into property suitable for commercial use. Remediation operations consist of construction-related and environmental-related work. Construction work includes bulldozing and excavating ground materials for processing; screening and crushing; and loading, unloading, and transporting materials throughout the jobsite. Environmental work entails sampling and testing ground material for contaminants and other substances and monitoring and maintaining wells located on the property—this work appears to be handled by the Employer’s separate environmental division known as Impact Environmental Closures.

During the Employer’s busy season, from about April through November, the East Chicago jobsite operates five to six days a week, eight to 12 hours a day. Chris Tripoli is the Construction Coordinator of the jobsite. He was hired in September 2018 and travels to jobsites throughout the U.S. He has been managing the East Chicago jobsite since its commencement in 2019. The parties stipulated that Tripoli is a supervisor within the meaning of Section 2(11) of the Act based on his authority to assign and responsibly direct other employees. Tripoli reports to Jon Morgan who does not appear to work on the jobsite—the record is silent regarding Morgan’s position and who he reports to. The petitioned-for employees and junior operators report directly to Tripoli regarding construction work. The evidence suggests the junior operators report to Mike Bluight when performing environmental work for Impact Environmental Closures. There is no evidence as to Bluight’s position,<sup>5</sup> who he reports to, and statutory supervisory authority, if any. Bluight works with another individual, Abel Israel, who appears to be responsible for environmental sampling and testing although the record is silent

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<sup>4</sup> An employee witness testified that the East Chicago remediation job is expected to last for about 10 years.

<sup>5</sup> An employee witness testified that Bluight is a Quality Assurance Manager.

regarding Israel's position and who he reports to.<sup>6</sup> The scale operator reports to Faith Gruber—the record is silent regarding Gruber's position, who she reports to, and the basis of her supervisory status.

Petitioner seeks to represent all of the Employer's equipment operators arguing that the petitioned-for unit is appropriate because these selected employees have certain skills and abilities that are required of them to operate heavy equipment including the bulldozer, excavator, wheel loader, and screener/crusher. The Employer argues that not only are the junior operators it seeks to include in the unit capable of and engaged in operating the same heavy equipment, but as equipment operators they also operate other non-heavy equipment also operated by the petitioned-for employees such as the skid steer, sweeper, roller, water truck and dump truck.

### **A. EQUIPMENT OPERATORS**

In 2019 as the East Chicago remediation job was commencing, the Employer advertised on Indeed.com, a public internet search engine for job postings, for employees in the positions of heavy equipment operator and laborer. The heavy equipment operator ad sought applicants with a minimum of two to three years of experience in earth-work projects and heavy equipment operation including bulldozers, excavators, wheel loaders and other related heavy equipment. The laborer ad sought applicants able to perform outside physical labor in property clearing including the use and operation of equipment such as chain saws, skid steers, chippers and related equipment; the laborer ad also required the ability to operate a manual transmission vehicle.<sup>7</sup> Pursuant to ads placed in 2019, the Employer hired one heavy equipment operator it classified as an equipment operator and four laborers it classified as junior operators during Summer 2019. The equipment operator hired had previous job experience in the operation of heavy equipment. However, at the beginning of the job in 2019 there was no heavy equipment onsite yet and the inventory of onsite equipment was limited to a skid steer, sweeper and roller – the Employer acquired more equipment gradually on the jobsite as operations progressed.

The equipment operator and junior operators hired in 2019 were all laid off due to lack of work in about November 2019. With the exception of one junior operator, the other four employees returned to work in about June 2020 during which time period the additional five equipment operators, one junior operator and one scale operator were hired. By this time, heavy equipment was acquired by the Employer and on the jobsite.

Five of the six petitioned-for equipment operators testified at the hearing. All five testified they answered an Indeed.com ad for a heavy equipment operator position and were interviewed by Tripoli. All but one testified they had previous job experience in heavy equipment operation. One witness, Leonard Jones, testified that although he did not have previous job experience, he possessed associate degrees in equipment operation and mechanics from a three-year technical/trade school during which time he operated heavy equipment. The equipment operators hired during Summer 2020, including Jones, were required to pass a practical test administered onsite by Tripoli in the operation of heavy equipment including a

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<sup>6</sup> An employee witness testified that Israel is an environmental technician.

<sup>7</sup> Two Indeed.com and two Glassdoor.com ads dated January 25, 2021 were entered in the record for the positions of "heavy equipment operator" and "laborer/excavation." These ads are consistent with employee witness testimony regarding the substance of the Indeed.com ads placed by the Employer in 2019 and 2020.

bulldozer, excavator, and/or wheel loader. Except for Jones, they were all classified as equipment operators. While Jones was classified on hire by the Employer as a junior operator, the record evidence demonstrates he has always performed the same work as the other equipment operators.

The wages of the equipment operators range from \$20.00 to \$24.00 per hour.<sup>8</sup> Their benefits include three days of paid time off (PTO), health insurance, and retirement benefits following one year of employment. Since the onset of the COVID-19 pandemic, the equipment operators report their hours to Tripoli who reports them via email to Human Resources (HR); before the pandemic, all employees signed in and out by a main telephone on the jobsite. Although equipment operators are not required to possess any formal certifications or licenses in the operation of equipment, they all possess knowledge and experience in the operation of heavy equipment. They are not required to possess Commercial Drivers Licenses (CDLs) because they only operate equipment onsite. There is some record evidence that Tripoli has coordinated some on-the-job training in equipment operation for the equipment operators by third party supplier representatives.

As noted, at the commencement of the job in 2019, the Employer's onsite equipment was limited to approximately one skid steer, one sweeper, and one roller. With the additional hiring of the equipment operators and other employees in 2020, the Employer acquired heavy equipment on the jobsite including three bulldozers, four excavators, two wheel loaders, one screener<sup>9</sup> and one crusher.<sup>10</sup> One water truck and a fleet of four dump trucks were also acquired.

A bulldozer is a heavy piece of equipment used on the job for the screening/crushing process and to grade materials: a "pushing dozer" is used for pushing rough rocks and materials into piles to prepare for the screening/crushing process, explained further below, and a "grader dozer" is used for smoothing out rough materials. An excavator is a heavy versatile piece of digging equipment used for breaking up concrete and oversized rocks and removing trees, and it also loads materials into the screener/crusher. A wheel loader<sup>11</sup> is a large bucket-type machine with four wheels also used in the screening/crushing process to remove material coming out of the screener/crusher, to stockpile materials, and to load materials onto dump trucks to be transported around or exported off the jobsite. Unlike the bulldozer, excavator and wheel loader, the screener and crusher are not driven. Rather, they are conveyor machines that screen and separate unwanted particles such as wood, concrete, and oversized rocks from usable dirt, and crush oversized concrete and rock to usable sizes for onsite remediation use.

A skid steer is much smaller than the heavy equipment described above and is most often used for moving pallets or totes of material from one point to another. It also has multiple attachments to it which can be used for unloading trucks, erecting fences, and general site cleanup. A sweeper is a small three-wheeled machine used to clear off mud and dirt from roadways and parking areas at the jobsite. A roller is a machine used to compact dirt and

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<sup>8</sup> One of the equipment operators was hired at a starting wage of \$27.00 per hour, however, his wage rate was later reduced to \$24.00 per hour based on an incident involving deficient job performance resulting in discipline.

<sup>9</sup> Also referred to in the record as a "material screening plant."

<sup>10</sup> Also referred to in the record as a "material crushing plant."

<sup>11</sup> Also referred to in the record as a "pay loader."

groundcover following excavation and during backfills. Unlike the heavy equipment vehicles, the skid steer, sweeper, and roller are all steering-wheel-only vehicles that can only go in forward and reverse directions. The water truck and dump trucks are manual transmission vehicles. The water truck is used for dust suppression during excavation and screening/crushing activities and the dump trucks are used to transport materials around the jobsite.

During the busy season, all of the equipment operators report to work around 5:30 a.m. and work an average of 50 to 60 hours per week.<sup>12</sup> During the off-season, the equipment operators start work later, around 6:30 a.m. In about December 2020, due to decreased work, the Employer reduced the hours of the six equipment operators and implemented an A/B rotating schedule so each crew of three equipment operators (A crew and B crew) work three days one week and two days the next week. This change in schedule was communicated by Tripoli to the equipment operators via a group text message.

In general, the equipment operators arrive at work earlier than the junior operators and scale operator. At the start of each shift, equipment operators attend a morning meeting conducted by Tripoli during which he assigns them their tasks and equipment for the day. On occasion during the busy season, some junior operators might attend this morning meeting with the equipment operators if they have arrived at work as early as them.<sup>13</sup> Depending on the tasks at hand and the busyness of the season, the equipment operators sometimes decide among themselves which machines they will operate and which jobs they will perform.

The five petitioned-for employee witnesses all testified they consistently spend 90 to 95 percent of their working time, during the busy and off seasons, operating heavy equipment including the bulldozer, excavator, wheel loader, and screener/crusher. Tripoli, the Employer's primary witness, acknowledged they spend 70 percent of their time operating such equipment. The screening/crushing procedure is regularly performed by the equipment operators during the busy season. In this procedure, outside trucks dump fresh unprocessed dirt on the jobsite and the bulldozer, excavator, and wheel loader operators all work in sequence. The bulldozer operator pushes the dirt into large piles to an excavator operator who loads the material onto the screener/crusher. The screener/crusher has a conveyor belt that carries the materials and screens and crushes it into separate piles. As the materials exit the screener/crusher, the wheel loader operator separates it into piles and loads it onto dump trucks for transporting onsite by equipment operators—only the equipment operators operate dump trucks except for one junior operator who operates a dump truck during the busy season as further described below. Bulldozer operators grade the dirt where it has been dumped onsite. Only the equipment operators are involved in operating equipment during the screening/crushing process. When they are not performing the screening/crushing process, the equipment operators perform other jobs onsite operating heavy equipment such as tree removal, backfilling, and other general excavation and bulldozing duties.

The employee witnesses all testified that when they are not performing heavy equipment jobs, their remaining work time is devoted to heavy equipment maintenance (e.g., greasing and cleaning machine tracks, replacing belts and general mechanical repairs). While Tripoli testified

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<sup>12</sup> Overtime for all employees is on a voluntary basis.

<sup>13</sup> At the commencement of the project in 2019, before a full complement of equipment operators were hired, the junior operators would regularly attend morning meetings with the one equipment operator on staff.

that they spend part of their work time operating non-heavy equipment including the skid steer, sweeper, roller, and water truck, all of employee witnesses testified they have operated such equipment only on rare occasion, especially since a full employee complement was achieved on the jobsite during Summer 2020.

Since the hiring of a full complement of employees in Summer 2020, the equipment operators testified they have had little interaction on the jobsite during the busy season with the junior operators limited to receiving some on-the-ground support during the screening/crushing process. As further explained below, there has been even less to no interaction between the equipment operators and junior operators during the recent off season as the junior operators have been working on the opposite side of the jobsite from equipment operators. All employees on the jobsite have two-way radios for communication with Tripoli and to the extent that they are alerted by the scale operator regarding materials coming onto and leaving jobsite, there is some two-way radio communication among all of the employees onsite.

## **B. JUNIOR OPERATORS**

As noted, the four junior operators responded to ads placed by the Employer for a laborer and were hired in Summer 2019. They were laid off in about November and, with the exception of one, all returned to work about June 2020. At that time, another employee, Patricia Tripoli,<sup>14</sup> was hired. In its statement of position filed in response to Petitioner's petition, the Employer classified Patricia Tripoli as a junior operator, while at the hearing and in brief, the Employer has referred to her classification as a scale operator or dual junior operator/scale operator. Her duties are described below. None of the junior operators were required to take any sort of practical test prior to hire.

During the busy season, the junior operators generally start work around 7:00 to 7:30 a.m., after the equipment operators. On occasion, when the jobsite is swamped, some of them may start as early as the equipment operators, in which event they may attend the same morning meeting with the equipment operators. Otherwise, they attend their own morning meeting conducted by Tripoli, who assigns them their tasks for the day. During the off season, the junior operators work reduced hours, starting work later and leaving work earlier than the equipment operators. They do not have a structured A/B schedule like the equipment operators. The wages of the junior operators range from \$16.00 to \$21.00 per hour and they enjoy the same benefits as the equipment operators. Like the equipment operators, the junior operators have been reporting their hours to Tripoli since the onset of the COVID-19 pandemic.

For the most part, the junior operators perform on-the-ground physical labor. During the busy season, they are mainly responsible for property clearing and maintenance including mowing; trimming; weed whacking; erecting fences; transporting, moving, and loading/unloading materials onsite; and general site cleanup. They occasionally use the skid steer, sweeper, roller, and water truck to perform their job duties. For example, they will use a skid steer for moving pallets or totes of material from one point to another, they will use the sweeper for roadway cleanup around the site, they will use the roller to compact dirt following

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<sup>14</sup> Patricia Tripoli is the spouse of Construction Coordinator Tripoli.

excavation and during backfills, and they will use the water truck to suppress dust during excavation and screening/crushing activities. The junior operators also provide occasional on-the-ground support to equipment operators during the screening/crushing process. This includes hand-picking through materials on the ground before they are fed into the screener/crusher to make sure unwanted materials such as metal do not damage the machine as well as occasionally using a skid steer to load or unload materials on the ground for the equipment operators and a water truck for dust control at the screening/crushing location.

Employer witness Tripoli testified that the junior operators spend 70 percent of their time operating non-heavy equipment (skid steer, sweeper, roller, water truck) during the busy season, while all of the employee witnesses testified the junior operators only occasionally use such equipment. Tripoli also testified that all but one junior operator are capable of operating a wheel loader and have operated it onsite, and one is designated as a “backup operator” when equipment operators are absent from work or need assistance onsite; and that one junior operator is in training on the excavator and has operated it onsite. The employee witnesses testified they have only seen junior operators operating heavy equipment on two occasions. On one occasion, a junior operator used a wheel loader to load materials during an emergent situation when all the equipment operators were operating dump trucks.<sup>15</sup> On another occasion, another junior operator used a bulldozer onsite. There are no other specific examples in the record of the junior operators operating any other heavy equipment and there is no dispute that they are not capable of and do not operate the excavator or screener/crusher. Except for junior operator Patricia Tripoli, described below, there is no dispute that the junior operators do not operate the dump trucks. There is no formal promotion process for the junior operators to be promoted to the equipment operator position.

The junior operators report to Tripoli while performing the activities described above during the busy season. During the off season, since about October 2020 to present, the junior operators have been working on the opposite side of the jobsite from the equipment operators performing environmental work in well maintenance with the Employer’s environmental division, Impact Environmental Closures. The record is unclear as to whether during this time the junior operators have been reporting to Tripoli as usual, or whether their reporting relationship has changed such that they have been reporting to Blight who appears to be in charge of onsite environmental operations.

Employee Patricia Tripoli’s hours and wage rate are consistent with those of the junior operators.<sup>16</sup> During the busy season, she spends most of her work time driving a dump truck and unloading materials onsite some of which have been loaded by a wheel loader operator in the screening/crushing process described above. Patricia Tripoli is the only junior operator who operates a dump truck; she does not operate any other heavy or non-heavy equipment. She also spends some time in the scale house assisting scale operator Lynn Robles, as further described below. During off season works, Patricia Tripoli has been working minimal hours in scale operations.

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<sup>15</sup> One of the employee witnesses testified he has observed this junior operator operate a wheel loader during the busy season “a handful of times.”

<sup>16</sup> While Patricia Tripoli’s wage rate was not specified, the record reveals she earns more than the scale operator straight wage rate of \$16.75 per hour.

### C. SCALE OPERATOR

Lynn Robles is the Employer's scale operator. She was hired in Summer 2020, earns \$16.75 per hour wage, and enjoys the same benefits as the other employees. During the busy season, she generally works 6:30 a.m. to 2:00 p.m. She is responsible for weighing inbound and outbound trucks and tracking the amount of materials imported onto and exported off the jobsite. She works in an isolated location on the jobsite called the scale house and has no face-to-face contact with other employees. She has regular communication with other employees via two-way radios regarding materials coming onto and leaving the site. As noted, she is assisted in the scale house by Patricia Tripoli although the record is unclear regarding the extent of the duties performed by Tripoli in the scale house.<sup>17</sup> During off season, Robles has been working minimal hours from about 6:30 to 11:00 a.m. at which time she is relieved by Patricia Tripoli who works 11:00 a.m. to close.

There is no dispute that Robles reports to supervisor Faith Gruber and does not attend any morning meetings with other employees onsite.<sup>18</sup>

### IV. UNIT COMPOSITION

Petitioner seeks to represent only equipment operators. The Employer contends that the unit should also include junior operators as they share a community of interest with equipment operators, as well as the scale operator as a residual employee.<sup>19</sup> For the reasons set forth below, I find that the equipment operators at the East Chicago jobsite share a community of interest sufficiently distinct from the interests of the employees the Employer seeks to include and I conclude that the junior operators and scale operator are appropriately excluded from the proposed unit.

#### A. BOARD LAW

When examining the appropriateness of a unit, the Board must determine not whether the unit sought is the only appropriate unit or the most appropriate unit, but rather whether it is “an appropriate unit.” *Wheeling Island Gaming*, 355 NLRB 637, 637 fn. 1 (2010) (emphasis in original) (citing *Overnite Transportation Company*, 322 NLRB 723 (1996)). In determining whether a unit is appropriate, the Board looks at whether the petitioned-for employees have shared interests. See *Wheeling Island Gaming*, 355 NLRB at 637. Additionally, the Board analyzes “whether employees in the proposed unit share a community of interest *sufficiently distinct* from the interests of employees excluded from that unit to warrant a separate bargaining unit.” *PCC Structural*s, 365 NLRB No. 160, slip op. at 11 (2017) (emphasis in original). See also *Wheeling Island Gaming*, 355 NLRB at 637 fn. 1 (the Board’s inquiry “necessarily proceeds to a further determination of whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant establishment of a separate unit”). In weighing the “shared and distinct interests of petitioned-for and excluded employees [...] the Board must determine whether ‘excluded employees have meaningfully distinct interests in the context of collective

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<sup>17</sup> There is also some scant vague record evidence based on the testimony of Employer witness Tripoli that one other junior operator also assists in the scale house.

<sup>18</sup> The record does not address the statutory supervisory status of Gruber.

<sup>19</sup> The Employer does not contend that the petitioned-for employees share a community of interest with the scale operator.



bargaining that *outweigh* similarities with unit members.” *PCC Structural, Inc.*, 365 NLRB No. 160, slip op. at 11 (emphasis in original) (quoting *Constellation Brands U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016)). Once this determination is made, “the appropriate-unit analysis is at an end.” *PCC Structural, Inc.*, 365 NLRB No. 160, slip op. at 11.

In making these determinations, the Board relies on its community of interest standard, which examines:

whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

*PCC Structural, Id.* at 11 (citing *United Operations*, 338 NLRB 123 (2002)).

The Board considers all of the factors together, as no single factor is controlling. *Id.* at 11 (citing *United Operations*, 338 NLRB at 123). Particularly important in considering whether the unit sought is appropriate are the organization of the plant and the utilization of skills. *Gustave Fisher, Inc.*, 256 NLRB 1069, 1069 fn. 5 (1981). With regard to organization of the plant, the Board has made clear that it will not approve of fractured units—that is, combinations of employees that are too narrow in scope or that have no rational basis. *Seaboard Marine, Ltd.*, 327 NLRB 556, 556 (1999). However, *all* relevant factors must be weighed in determining community of interest.

In construction industry cases, “collective bargaining for groups of employees identified by function as well as those groups identified by craft skills has proven successful and has become an established accommodation to the needs of the industry and of the employees so engaged.” *W.P. Butler Company*, 214 NLRB 1039, 1039 (1974), citing *R.B. Butler, Inc.*, 160 NLRB 1595, 1599 (1966).

## **B. APPLICATION OF BOARD LAW TO THIS CASE**

In reaching the conclusion that the petitioned-for unit of equipment operators is appropriate, I rely on the following analysis and record evidence.

### *1. Organization of the Plant*

An important consideration in any unit determination is whether the proposed unit conforms to an administrative function or grouping of an employer’s operation. Thus, for example, generally the Board would not approve a unit consisting of some, but not all, of an employer’s production and maintenance employees. See *Check Printers, Inc.*, 205 NLRB 33 (1973). However, in certain circumstances the Board will approve a unit even though other employees in the same administrative grouping are excluded. *Home Depot USA*, 331 NLRB 1289, 1289-1291 (2000).

Here, noting the special conditions of the construction industry which warrant the establishment of bargaining units according to function and craft skills, the record demonstrates that the Employer has established distinct administrative groupings distinguishing equipment operators from junior operators. Although they are not required to possess any formal certifications or licenses, all of the equipment operators possess a high degree of skill, knowledge, and experience in the operation of intricate, expensive, and potentially dangerous heavy equipment. They are not required to possess CDLs because they only operate equipment onsite. They all have extensive experience in operating heavy equipment and, except for one, they all have prior job experience in heavy equipment operation.

While the Employer argues that the equipment operators and junior operators on the jobsite all function as one team without separate identification or differences, the record evidence demonstrates otherwise. The equipment operators operate heavy equipment almost exclusively throughout the year, during the busy and off seasons. The junior operators are more versatile: they perform mostly on-the-ground physical labor tasks throughout the job site which sometimes includes the use of non-heavy equipment. As further explained below, the junior operators do not operate heavy equipment on any regular basis and, with the exception of one, they do not drive dump trucks. Likewise, the record does not support the Employer's position that the equipment operators operate non-heavy equipment on any regular basis. Additionally, besides Employer witness Tripoli's conclusory testimony that he provides training and additional supervision to those junior operators who "show desire or talent" to operate equipment, there is no record evidence that the two groups of employees share any common training related to equipment operation or otherwise. However, there is evidence that the equipment operators have had some specialized training by third party supplier representatives. Overall, the record evidence demonstrates that the two groups of employees do not regularly share any equipment or tasks. These factors weigh in favor of the proposed unit of equipment operators excluding the junior operators sought to be included by the Employer.

## *2. Common Supervision*

Another community-of-interest factor the Board considers when evaluating the appropriateness of a petitioned-for unit is whether the employees in dispute are commonly supervised. In examining supervision, most important is the identity of employees' supervisors who have the authority to hire, fire, or discipline employees (or effectively recommend those actions) or supervise the day-to-day work of employees, including rating performance, directing and assigning work, scheduling work, and providing guidance on a day-to-day basis. *Executive Resource Associates*, 301 NLRB at 402. Common supervision weighs in favor of placing the employees in dispute in one unit but separate supervision does not mandate separate units. *Casino Aztar*, 349 NLRB 603, 607, fn. 11 (2007). However, the fact that two groups are commonly supervised does not mandate that they be included in the same unit, particularly where there is no evidence of interchange, contact, or functional integration. *United Operations*, 338 NLRB at 125.

Here, the record demonstrates that during the busy season, the equipment operators and junior operators all report to Construction Coordinator Tripoli. However, the record is not clear regarding the current reporting relationship of the junior operators since October 2020 when they

have been performing environmental work in well maintenance at the jobsite, purportedly for the Employer's environmental division, Impact Environmental Closures, and whether they have been reporting to Mike Bluight, the management official purportedly in charge of environmental operations during this time. The common supervision during the busy season weighs in favor of placing the employees in dispute in one unit; however, the uncertainty of the junior operators' current reporting relationship while they have been performing environmental work makes this factor less conclusive.

### 3. *The Nature of Employee Skills and Functions*

This factor examines whether disputed employees can be distinguished from one another on the basis of job functions, duties, or skills. If they cannot be distinguished, this factor weighs in favor of including the disputed employees in one unit. Evidence that employees perform the same basic functions or have the same duties, that there is a high degree of overlap in job functions or of performing one another's work, or that disputed employees work together as a crew, supports a finding of similarity of functions. Evidence that disputed employees have similar requirements to obtain employment; that they have similar job descriptions or licensure requirements, participate in the same Employer training programs, or use similar equipment supports a finding of similarity of skills. *Casino Aztar*, 349 NLRB at 603 (petitioned-for beverage employees have no separate community of interest from restaurant and catering with regard to job function, duties, or skills); *J.C. Penney Company, Inc.*, 328 NLRB 766, 766-767 (1999) (petitioned-for employees in catalog fulfillment department and telemarketing employees "have similar skills and perform similar functions"); *Brand Precision Services*, 313 NLRB 657, 657-658 (1994) (a unit of operators, apart from other production employees, is not appropriate where "the operators' training, skills, and functions are not distinct from those of the laborers or leadmen"); *Phoenician*, 308 NLRB 826, 827-828 (1992) (petitioned-for unit of golf course maintenance employees is too limited in scope and must include the landscape employees where "high degree of overlap in job functions" exists).

Here, the petitioned-for equipment operators do not perform the same basic functions and do not have the same job duties. The equipment operators answered a job ad for the position of heavy equipment operator and were hired primarily to operate heavy equipment while the junior operators presumably answered a job ad for the position of laborer and were hired primarily to perform outside physical labor in property clearing requiring the operation of non-skilled equipment and a manual transmission vehicle. As noted, although they are not required to possess any formal certifications or licenses, all of the equipment operators possess skill, knowledge, and experience in the operation of heavy equipment, in contrast to the junior operators. The record clearly demonstrates the Employer hired the employees to perform different functions: as skilled operators of heavy equipment or as physical laborers. See, *Hydro Constructors Incorporated*, 168 NLRB 105, 105 (1967).

The Employer argues that the petitioned-for equipment operators and the junior operators are all equipment operators. The Employer contends that the only differences are that junior operators are less experienced, have less "seat time" on equipment, and require some additional supervision and training in the operation of equipment. In this regard, the Employer asserts that the junior operators either operate heavy equipment or are in training to do so, *and* the equipment operators spend a significant portion of their work time operating non-heavy equipment used by

the junior operators. However, the record does not support the Employer's assertions. Rather, the record demonstrates that the equipment operators almost exclusively operate heavy equipment during the busy and off seasons while the junior operators spend most of their time performing physical labor work on the ground, sometimes using non-heavy equipment including the skid steer, sweeper, roller, and water truck.<sup>20</sup> Except for two isolated examples in the record of a junior operator using a wheel loader on one or a few occasions and another junior operator using a bulldozer, there is no record evidence supporting the Employer's position that junior operators use the same equipment as the petitioned-for employees. There is no record evidence that the equipment operators and junior operators substitute for each other or that they have been similarly trained in any manner. Moreover, the Employer witness Tripoli did not dispute that the junior operators are akin to "unskilled operators" and have not ever operated, or possess skills to operate, the excavator or the screener/crusher. Thus, the Employer's argument that junior operators are "dual function employees" who "perform bargaining unit work, i.e., operate equipment" is without merit. Further, that the junior operators provide occasional on-the-ground-support to the equipment operators such as during the screening/crushing process does not warrant their inclusion in the unit where a majority of their work time is spent engaged in physical labor duties. See *Hydro Constructors*, 168 NLRB at 105 (relying on *R.B. Butler*, *supra*, the Board found petitioned-for unit of laborers alone without truckdrivers appropriate where despite common supervision and working conditions and occasional performance of each other's duties, petitioned-for employees spent substantial amount of their time engaged in laborers duties and received less pay.)

The record also does not support the Employer's position that at times during the workday when no equipment is being operated the equipment operators with the junior operators collectively perform jobs such as erecting and moving signage, assisting and directing traffic, clearing trees, covering and uncovering stock piles with plastic covering, and general site cleanup. Rather, five of the six petitioned-for equipment operators testified that they consistently spend at least 90 percent of their workday operating heavy equipment and the remaining portion engaged in equipment maintenance. Notably, the Employer acknowledges the equipment operators spend 70 percent of their work time operating heavy equipment. See *W.P. Butler*, 214 NLRB at 1039 (three employees of a construction company who spent no more than 26 percent of their time operating or maintaining heavy equipment were excluded from a unit of heavy equipment operators and mechanics, since they were predominantly engaged in functions other than the operation and maintenance of heavy equipment.) Additionally, as noted, the record demonstrates that since October 2020, the junior operators have been performing non-

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<sup>20</sup> The record contains a joint collective-bargaining agreement (CBA) introduced by the Employer entitled Illinois Building Agreement (effective June 1, 2017 through May 31, 2021) between Petitioner and an employer association comprised of construction industry employers for construction building work performed in certain counties in Illinois. The Employer argues the CBA is relevant to the general scope of work performed by and equipment operated by all Petitioner-represented individuals which includes work utilizing heavy and well as non-heavy equipment. However, this CBA related to construction building work in Illinois does not pertain to any work being performed at the instant East Chicago, Indiana, jobsite. Additionally, no party asserts any history of collective bargaining with regard to the petitioned-for employees. I find this CBA to have no relevance to the instant proceeding and has no bearing on any factor the Board weighs in determining an appropriate unit under the PCC community of interest analysis.

construction environmental work in well maintenance on the opposite side of the jobsite from the equipment operators for the Employer's environmental division.<sup>21</sup>

In sum, despite some minor distinctions, equipment operators perform work with the possession of specialized and different skills and spend almost all of their working time operating heavy equipment. The above factors weigh in favor of finding that the petitioned-for unit of equipment operators is appropriate.

#### 4. *Interchange and Contact Among Employees*

Interchangeability refers to temporary work assignments or transfers between two groups of employees. Frequent interchange “may suggest blurred departmental lines and a truly fluid work force with roughly comparable skills.” *Hilton Hotel Corp.*, 287 NLRB 359, 360 (1987). As a result, the Board has held that the frequency of employee interchange is a critical factor in determining whether employees who work in different groups share a community of interest sufficient to justify their inclusion in a single bargaining unit. *Executive Resource Associates*, 301 NLRB at 401 (citing *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1015 (9th Cir. 1081)). Lack of significant employee interchange between groups of employees is a “strong indicator” that employees enjoy a separate community of interest. *Id.* at 401.

The greatest extent of contact between equipment operators and junior operators appears to be in the busy season when the junior operators provide some on-the-ground support in the screening/crushing process. During these times, the junior operators will use a skid steer to load or unload materials for the equipment operators or a water truck to for dust control at the screening/crushing location; in addition, all of the employees might hand-pick through materials together before they are fed into the screener/crusher. There is also some evidence of two-way radio communication initiated by scale operator among all the employees onsite regarding materials coming onto and leaving the jobsite. Otherwise, there is minimal interchange and work-related contact on the jobsite between the petitioned-for equipment operators and the junior operators.

Since the majority of the equipment operators were hired during Summer 2020 and heavy equipment was acquired, they cross paths at work on a very limited basis—the equipment operators spend a majority of each work day in heavy equipment machines at a specific location onsite while the junior operators are more scattered throughout the jobsite. There are no posted work schedules and the two groups of employees generally arrive to work at different times and participate in separate morning meetings conducted by Tripoli. Only on occasion during the busy season when the jobsite is swamped will junior operators that have arrived to work earlier than normal participate in the equipment operators' morning meeting. Further, except for two isolated examples mentioned above regarding one junior operator operating a wheel loader for one day and another junior operator operating a bulldozer on a limited basis, there is no record evidence demonstrating transfers among the two groups of employees. In this regard, the record demonstrates there is no formal process for promotion of a junior operator to an equipment

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<sup>21</sup> Although Tripoli testified that the petitioned-for employees have likewise assisted in environmental work, his testimony was unspecific, vague and conclusory and is not otherwise supported by the record.

operator position. Finally, as noted, since October 2020 the junior operators have been performing environmental work on the opposite side of the jobsite from the equipment operators.

The Employer's reliance on *United Rentals, Inc.*, 341 NLRB 540 (2004) is misplaced. In that case, based on *overwhelming and undisputed* evidence of overlapping duties and interchange between the excluded employees and the petitioned-for employees, the Board, in contrast to the Region, found the excluded employees shared such a substantial community of interest with the petitioned-for employees that they must be included in the unit. *Id.* at 541 (emphasis added). Here, the record does not similarly demonstrate overwhelming and/or undisputed evidence of overlapping duties and/or interchange between the junior operators and the petitioned-for employees.

#### 5. *Degree of Functional Integration*

Functional integration refers to when employees' work constitutes integral elements of an employer's production process or business. For example, functional integration exists when employees in a unit sought by a union work on different phases of the same product or as a group provides a service. Evidence that employees work together on the same matters, *have frequent contact with one another, and perform similar functions* is relevant when examining whether functional integration exists for community of interest purposes. *Transerv Systems*, 311 NLRB 766, 766 (1993) (emphasis added). On the other hand, if functional integration does not result in contact among employees in the unit sought by a union, the existence of functional integration has less weight.

The record demonstrates functional integration to the extent that the equipment operators and junior operators perform work in construction operations supporting environmental remediation. However, the lack of any regular and frequent work-related contact or interchange among the employees or performance of similar skills and duties makes this factor less conclusive.

#### 6. *Terms and Conditions of Employment*

Terms and conditions of employment include whether employees receive similar wages and are paid in a similar fashion (for example hourly); whether employees have the same fringe benefits; and whether employees are subject to the same work rules, disciplinary policies, and other terms of employment that might be described in an employee handbook. However, the facts that employees share common wage ranges and benefits or are subject to common work rules does not warrant a conclusion that a community of interest exists where employees are separately supervised, do not have sufficient interchange, or work in a physically separate areas. *Bradley Steel, Inc.*, 342 NLRB 215, 215-216 (2004); *Overnite Transportation Company*, 322 NLRB at 350. Similarly, sharing a common personnel system for hiring, background checks, and training, as well as the same package of benefits, does not warrant a conclusion that a community of interest exists where two classifications of employees have little else in common. *American Security Corporation*, 321 NLRB 1145, 1146 (1996).

Here, the equipment operators share some common terms and conditions of employment with junior operators whom the Employer seeks to include in the unit. These include an hourly

wage rate and the same benefits. The record is silent regarding any policies, procedures, or work rules in effect either on the jobsite or companywide. On the other hand, there are some significant differences between the terms and conditions of employment between the employees, particularly with regard to wage ranges. In this regard, equipment operators earn higher wages than junior operators; the lowest starting wage rate for an equipment operator is \$20.00 per hour and the highest is \$27.00 per hour, while the lowest starting wage rate for a junior operator is \$16.00 per hour and the highest is \$21.00 per hour. Further, as noted, the Employer acknowledges there is no formal process for promotion of the junior operators to the equipment operator position. Although the employees share some similar employment terms and conditions, there are noted differences regarding their wages and they have little else in common such that this factor supports my overall finding in favor of the petitioned-for unit.

## V. CONCLUSION<sup>22</sup>

In determining that the unit sought by Petitioner is appropriate, I have carefully weighed the community-of-interest factors cited in *PCC Structurals* and *United Operations*, *supra*.<sup>23</sup> I conclude that the unit sought by Petitioner is appropriate because the record reveals that the petitioned-for equipment operators are a sufficiently distinct, recognizable group; their distinct interests outweigh their shared interests with the employees the Employer seeks to include. More specifically, the overall separate organizational structure of the Employer's heavy equipment operations, lack of contact and interchange between the employees, and difference in skills and functions strongly weigh in favor of finding that the junior operators do not share a community of interest with the equipment operators sufficient to mandate their inclusion in the same unit.<sup>24</sup>

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<sup>22</sup> I find that Leonard Jones is properly included in the unit as an equipment operator as the record evidence clearly demonstrates he performs the same duties with the other equipment operators in the operation of heavy equipment, shares the same supervision and terms and conditions of employment, and is a part of their administrative grouping. That Jones is the least experienced equipment operator without previous job experience and in training does not detract from my finding of his status as an equipment operator despite his classification by the Employer as a junior operator.

<sup>23</sup> In its brief, the Employer, argues that "Petitioner is seeking a 'micro unit' of employees who share a smaller community of interest" and, citing *PCC*, states that "[m]icro units were eradicated by the current Board and, therefore, it should not and cannot be the basis for a finding that limits the size of the unit only to those employees the Petitioner has organized." However, no such finding was made by the Board in *PCC* (the Employer's reference in its brief to "micro units" can be found in footnote 14 of the *PCC* dissenting opinion). In overruling *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2911), the *PCC* Board abandoned the "overwhelming" community-of-interest standard and reinstated the traditional community-of-interest standard for determining an appropriate bargaining unit in union representation cases. The Board merely held that "when it is asserted that the smallest appropriate unit must include employees excluded from the petitioned-for unit, [it] will no longer be constrained by the extraordinary deference that *Specialty Healthcare* affords to the petitioned-for unit." *Id.* at 9. Rather, the Board held it "will consider the possibility that excluded employees must be part of an appropriate unit, without regard to whether or not an "overwhelming" community of interests exists between the petitioned-for employees and those excluded from the unit." *Id.* at 15 Further, the *PCC* Board made it clear that it was not departing from the longstanding principle that "a proposed unit need only be *an* appropriate unit and need not be *the most* appropriate unit." *Id.*

<sup>24</sup> As noted, the Employer does not argue that the scale operator should be included in the unit based on a community of interest standard, but rather, argues she cannot be left out as a residual employee if the junior operators are included in the unit. Since I have found the junior operators are not properly included in the

Based on the entire record in this matter and in accordance with the discussion above, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**Included:** All full-time and regular part-time equipment operators employed by the Employer currently working at its jobsite located at 5135 Kennedy Avenue, Site Trailer A, East Chicago Indiana.

**Excluded:** All junior operators, scale operators, salaried managers, temporary employees, other contracted employees, office clerical employees, confidential employees, professional employees, guards and supervisors as defined by the Act.

Those eligible shall vote whether they wish to be represented for the purposes of collective bargaining by International Union of Operating Engineers, Local 150, AFL-CIO.

Those eligible shall vote as set forth in the attached Direction of Election.

#### **A. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Union of Operating Engineers, Local 150, AFL-CIO.

##### **A. Election Details**

I direct that the election be conducted by mail ballot.<sup>25</sup>

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit at 5:00 p.m. on **Monday, March 15, 2021**, from the National Labor Relations Board, Region 13, 219 S. Dearborn Street, Suite 808, Chicago, IL 60604. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote by mail and do not receive a ballot in the mail by **Monday, March 22, 2021**, should communicate immediately with the National Labor Relations Board by either calling the Region 13 Office at (312) 353-7570 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

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petitioned-for unit and Petitioner has not petitioned to include scale operators, the issue as to the scale operator's inclusion in the proposed unit is moot.

<sup>25</sup> The Employer insisted on a manual election at the time of hearing but through the Region's administrative investigation following the hearing, the Employer has withdrawn such request and agrees to a mail ballot election.



Ballots will be due on Monday **April 12, 2021**. All ballots will be commingled and counted on **Wednesday, April 14, 2021** at 3:00 p.m. In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

## **B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending **March 12, 2021**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

## **C. Voter List**

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **March 10, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

The list shall be filed electronically with the Region and, if feasible, served electronically on the other parties named in this decision. The list can be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

#### **D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting, and likewise shall be estopped from objecting to the non-distribution of notices if it is responsible for the non-distribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

#### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

**Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site ([www.nlr.gov](http://www.nlr.gov)), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden.**

To E-File the request for review, go to [www.nlrb.gov](http://www.nlrb.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and, therefore, the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Chicago, Illinois this 8<sup>th</sup> day of March 2021.

*/s/ Paul Hitterman*

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Paul Hitterman, Acting Regional Director  
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